# Compass Bancshares

Compass Bancshares, Inc
PO Box 10566
Birmingham, Alabama 35296
www.compassweb.com

**Jerry W Powell**
General Counsel / Secretary



December 14, 2005

*Via E-mail to comments@FDIC.org*

Mr. Robert E. Feldman
Executive Secretary
Attention: Comments/Legal ESS
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

**Re: Proposed Rulemaking – Interstate Banking; Federal Interest Rate Authority**

Dear Mr. Feldman:

Compass Bancshares, Inc ("Compass") very much appreciates the opportunity to comment on the proposed rulemaking recently published by the Federal Deposit Insurance Corporation ("FDIC") regarding the preemption of certain state laws and parity between insured state banks and national banks. 70 Fed. Reg. 60019 (October 14, 2005). Compass recognizes that the FDIC has dedicated much effort in its thoughtful deliberation of the requests made in the Petition for Rulemaking filed by the Financial Services Roundtable (the "Roundtable"), to which the FDIC's proposed rule responds. Compass urges the FDIC to adopt this proposed rule with the modifications suggested below.

Compass is a Delaware bank holding company, headquartered in Birmingham, Alabama, which is qualified as a financial holding company. Through its lead-bank subsidiary, Compass Bank, an insured Alabama-chartered bank, and various other affiliates, Compass provides a broad range of banking, trust and financial services to customers through branches in Alabama, Arizona, Colorado, Florida, New Mexico and Texas and operations in an additional twelve states. As of September 30, 2005, Compass had $30,144,518,000 in assets and three hundred ninety-one branches with 8100 employees.

Compass has had the opportunity to discuss and debate the merits of the proposed rulemaking with its colleagues and competitors. Compass shares the views of the Roundtable that certain changes to the proposed rule must be made in order to effectuate the parity that Congress intended Compass urges the FDIC to make appropriate revisions in the final rule to resolve the matters described below.

- Scope of Section 331 4(c). Section 331.4 should be revised to assure that its scope of operation is no narrower than that of GC 11, and to remove any ambiguity regarding the use of the permissive "may" in these subsections.

- Applicability of Section 331 to Operating Subsidiaries. Part 331 should be revised to recognize expressly that this Part may be utilized by insured state bank subsidiaries ("operating subsidiaries") to the same extent that 12 U.S.C. § 85 (commonly referred to as "Section 85" of the National Bank Act) may be utilized by subsidiaries of national banks

- Construction of Section 362.19. Section 362.19 should be revised to include a rule of construction (similar to the rule included in Section 331.1(c)) providing that state law will apply to a state bank with a branch in a host state only when a state law applies to a national bank with a branch in that host state under 12 U S C. § 36(f).

- Requirement of "Activities Conducted at a Branch." The proposed FDIC definition of "activities conducted at a branch" contained in Section 362.19 imposes limits on state banks that do not apply to national banks and thus provides less than full parity with national banks. This definition should be revised to remove these limitations.

- Requirements Related to Preemption Determinations. Under the proposed rule, the preemption provided in Section 362.19(c) applies only if a federal court or the Office of the Comptroller of the Currency (the "OCC") has determined in writing that "the particular host state law" does not apply to an activity conducted at a branch in the host state by an out-of-state national bank. This provision should be revised to recognize that the required determination of preemption: (i) is not limited to determinations regarding a "particular" law, and (ii) may be made by a state court located in the host state in question

Preservation of the Dual Banking Charter

Compass shares the belief of the Financial Services Roundtable that the viability of the dual banking charter system must be protected by regulatory action such as the proposed rulemaking. Extensive preemption of state laws has been achieved for national banks through rulemaking and court action. The resulting disparity of circumstances between national and state banks threatens the integrity of the dual banking system by favoring national banks' competitiveness. Significant legislation was passed in the 1990's to avoid a "runoff" from state charters to national charters and preserve competitiveness, authority for the FDIC to promulgate rules in furtherance of that goal is available today. At the heart of the issue is the competitive principle of point-counterpoint that flows from a dual charter system.

In light of the importance of a competitive dual banking system and the increasing breadth of federal preemption, Compass urges the FDIC to adopt, with the changes discussed below, the proposed rulemaking in order to provide parity between insured state banks and national banks conducting interstate activities, whether through branches or other permissible

venues or means. These rules are necessary to maintain the competitiveness of the state charter and assure, as Congress intended when it passed Riegle-Neal II in 1997, that a competitive equality remains in force. As recognized in the proposed rulemaking, Congress intended to promote parity between state banks and national banks in interstate banking The goal of parity was repeatedly expressed in Congress during its consideration of Riegle-Neal II. The FDI Act authorizes the FDIC to adopt rules it deems necessary to carry out the provisions of any law that it has the responsibility of administering or enforcing, and Compass urges the FDIC to exercise this authority in order to assure parity between insured state banks and national banks in the exercise of their rights and powers relating to interest rates under 12 U.S.C. § 1831d (commonly referred to as "Section 27" of the FDI Act) and 12 U.S.C. § 85 (commonly referred to as "Section 85" of the National Bank Act) and the application of host state law under 12 U.S.C. § 1831j (commonly referred to as "Section 24" of the FDI Act) and 12 U.S.C. § 36(f) (commonly referred to as "Section 36" of the National Bank Act), respectively.

Scope of Section 331 4(c).

Compass supports the move to codify the positions and analysis expressed in GC 10 and GC 11, but is concerned that proposed Section 331.4 permits application of home state law in a more limited range of situations than is permitted under GC 11. Section 331.4(c) provides that home state rates may be applied "where the non-ministerial functions occur in branches located in different host states or any of the non-ministerial functions occur in a state where the state bank does not maintain a branch." By contrast, GC 11 provides that "[i]f the three non-ministerial functions occur in different states or if some of the non-ministerial functions occur in an office that is not considered to be the home office or branch of the bank, then home state rates may be used." 63 Fed Reg. at 27286 Unlike GC 11, Section 331.4 does not provide for the application of home state rates where a bank makes a loan to a resident of another state if two of the non-ministerial functions are performed in the same host state branch, even if the other non-ministerial function is performed in the home state.

Assume, for example, that a bank in State X makes a loan to a resident of State Z, and the bank: (1) approves the loan at its home office in State X, (2) communicates final approval of the loan to the borrower from a branch in State Z, and (3) disburses the loan proceeds to the borrower at the same branch in State Z Under these facts, GC 11 would permit the state bank to use home state rates, as would federal law applicable to national banks. Section 331.4(c), however, does not provide for the application of home state rates in this not uncommon fact situation The result under Section 331 4(c) not only is different from the result under GC 11, it also is contrary to the Congressional intent to establish parity between state and national banks, which was discussed in GC 11. Section 331.4 should be revised to assure that its scope of operation establishes the parity with national banks intended by Congress and, at a minimum, is no narrower than that of GC 11

Compass also believes that Section 331.4(b) and (c) should be revised to remove any ambiguity regarding the use of the permissive "may" in these subsections In order to clarify

banks' right to determine the applicability of home state rates and host state rates and to avoid litigation regarding banks' ability to make this determination, Compass urges the FDIC to revise each of these subsections to begin "May, at the option of the bank, be determined....."

Applicability of Part 331 to Operating Subsidiaries.

Compass fully supports the inclusion of the rule on construction contained in Section 331.1(c), and agrees with the FDIC's stated intent to assure that this Part may be utilized by operating subsidiaries to the same extent as Section 85 of the National Bank Act may be utilized by subsidiaries of national banks. See 70 Fed. Reg. at 60027. We agree with the Roundtable that allowing operating subsidiaries to utilize Part 331 appropriately implements the parity principle enacted by Congress.

Although the preamble included in the FDIC's notice recognizes that operating subsidiaries may utilize Part 331, Compass is concerned that no mention of this fact appears in the rule itself. Compass strongly urges the FDIC to include an express statement to this effect in the final rule.

Construction of Section 362.19.

Section 331.1(c) expressly provides that the FDIC will construe Section 27 of the FDI Act and the implementing regulations to be codified in Part 331 in the same manner as the OCC construes Section 85 and its implementing regulations. Compass believes that the rationale for including this rule of construction regarding Section 27 also applies equally to Section 24(j). Just as the interest rate provisions in Section 27 were based on Section 85, and should be given *in pari materia* interpretation, the applicable law provisions in Section 24 of the FDI Act were based on Section 36 of the National Bank Act and should be given *in pari materia* interpretation. For this reason, Compass urges the FDIC to include a rule of construction in Section 362.19 comparable to the rule already included in Section 331.1 to assure parity between state and national banks.

Requirement of "Activities Conducted at a Branch."

Proposed Section 362.19(a)(4) establishes the applicability of home state law and host state law to an "activity conducted at a branch" in the host state, and defines this concept to mean "an activity of, by, through, in, from, or substantially involving, a branch." According to the preamble to the FDIC's notice, this definition "is designed to give effect to Congress' intent to grant state banks full parity with national banks with respect to interstate branches." 70 Fed. Reg. at 60027 We understand that this concept of "activity conducted at a branch" attempts to take into account the use of the word "branch" in Section 24. However, we agree with the Roundtable that, in comparison with the OCC's broader implementation of Section 36, the proposed rule gives undue, talismanic weight to the word "branch" and, contrary to the FDIC's stated intention in doing so, undermines the parity intended by Congress.

Compass requests the FDIC either to omit "substantially" from this definition in its final rule or, at a minimum, to add discussion indicating that the "substantially involving" means any formal involvement or role of the branch, any involvement of a branch employee, any use of systems or facilities serving the branch, or any other type of contact with the branch

Requirements Related to Preemption Determinations.

Under the proposed rule, the preemption provided in Section 362.19(c) applies only if a federal court or the OCC has determined in writing that "the particular host state law" does not apply to an activity conducted at a branch in the host state by an out-of-state national bank. Compass shares the concern expressed by the Roundtable that the FDIC's final rule should include one or more practical methods that will allow state banks to obtain guidance regarding applicable law determinations without undue delay and burdensome procedures. The inclusion of such methods is necessary to assure full parity between state banks and national banks, and to avoid the confusion, competitive inequality, and potential litigation that may develop when the applicability of any law is unclear. Although we generally support the kinds of methods suggested by the Roundtable in its comment letter, we recognize that the specifics must be worked out by the FDIC, in consultation with the OCC, in order to produce reasonable methods that are workable for banks and regulators alike.

Along with the Roundtable, Compass urges the FDIC to reconsider the use of the word "particular" in this provision because it is inconsistent with Congressional intent and will prove not only unworkable for state banks, state bank regulators, the FDIC, and the OCC, but also counterproductive In view of the OCC's adoption of preemption rules that broadly preempt categories of state law, rather than "particular" state laws, and the fact that the OCC now rarely makes written determinations addressing a specific state law or rule, we believe this provision, as drafted, would not result in the intended parity. The most straightforward change would be to delete "particular." If the FDIC chooses not to do so, we recommend addition of language expressly referencing the applicable OCC preemption regulations in 12 C.F.R., Part 7, Subpart D, which provide detailed guidance on the types of state laws that are preempted for national banks.

Even if the word "particular" is deleted from proposed Section 362.19(c), we request that this provision be revised to clarify that, when a host law does not apply to a national bank, it will not apply to a state bank. The OCC preemption regulations do not use the "applicable law" language of Riegle-Neal and, if read literally, may not be viewed as a written determination by the OCC that "host state law does not apply to an activity at a branch in the host State of an out-of-State, national bank."

Compass also believes that the FDIC's final rule also should provide that the required determination of preemption may be made by a state court located in the host state in question.

Conclusion

Thank you for considering Compass' views on these important issues. If you have any further questions or comments on this matter, please do not hesitate to contact me at (205) 297-3960 or our counsel, H. Hampton Boles, Balch & Bingham, LLP, at (205) 226-3471.

Sincerely,

Jerry W Powell
General Counsel